BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the matter of

Implementation of Section 309(j) of the Communications Act --Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket NO. 92-52
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

COMMENTS OF UNITED BROADCASTERS COMPANY

1. United Broadcasters Company ("United") hereby files its Comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") released on November 26, 1997 in the above captioned proceeding. United is an applicant for construction permit for a new, Class A FM Broadcast Station at Rio Grande, Puerto Rico. After a full evidentiary hearing involving three other applicants, United's application was granted by a decision of the Review Board released on September 1, 1993. Rio Grande Broadcasting Co., 8 FCC Rcd 6256. Applications for review of the Board's decision were filed by the losing applicants on October 1, 1993. Before the Commission could act upon these applications, the Court issued its decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir 1993) ("Bechtel II"). Thus, Rio Grande is one of the

twenty unresolved cases that had progressed at least to an Initial Decision before the Court held in Bechtel II that the comparative factor of integration of ownership and day to day management was unlawful and must be abandoned. The Commission highlighted these twenty cases for special consideration in the Notice. United submits that in light of the substantial resources it and other parties similarly situated have expended in prosecuting their applications through a full evidentiary hearing over the past several years, basic fairness requires that these cases, where possible, proceed to prompt conclusion on the basis of factors established on the record presently before the Commission and which remain viable after Bechtel II.

2. As is pointed out more particularly below, there are basic qualifying and comparative considerations in the Rio Grande proceeding which remain viable after Bechtel II upon which the Commission should base its decision. As requested by the Commission, (Notice, para. 22) United sets forth below specific information and explanation in support of its position.

3. United's application was filed with the Commission almost ten years ago on August 16, 1988 and was designated for a comparative evidentiary hearing along with five other mutually exclusive applications by a Hearing Designation Order of the Commission released on September 6, 1990, Rio Grande Broadcasting, Co, 5 FCC Rcd 5442. Two of the applications were later dismissed and the remaining four proceeded to hearing. In addition to United, they are: Rio Grande Broadcasting, Co. ("RGB"), Roberto Passalacqua ("Passalacqua") and Irene Rodriguez Diaz De McComas ("McComas"). After six days of evidentiary hearings in December, 1991, an Initial Decision was released November 27, 1992 recommending grant of

the RGB application. Rio Grande Broadcasting, Co., 7 FCC Rcd 2682. The Review Board's decision released on September 1, 1993, 8 FCC Rcd 6256, reversed the Initial Decision and granted the application of United. The Board dismissed the application of Passalacqua for his failure to timely specify a viable transmitter site and affirmed the assessment of a decisive diversification demerit against McComas. As between United and RGB, the Board reduced RGB's integration credit to 75.5% " . . . which effectively . . . [eliminated] it from comparative consideration . . . " and found that United " . . . with one hundred percent quantitative integration credit . . . with qualitative enhancement, no diversification demerit and good technical coverage," was the superior applicant. (Rev. Bd., par. 3).

4. The Review Board's decision in treating the various applicants in Rio Grande, supra, did not rely solely on the factor of diversification. Elimination of "diversification" from the decision making process as a result of Bechtel II leaves intact other essential and decisionally significant differences among the parties which were recognized and relied upon by the Review Board in reaching its decision. The Commission should proceed to decision based upon those valid considerations, both qualifying and comparative, and conclude the hearing process in Rio Grande and similar post-decisional cases pending before it without requiring those applicants to participate in a competitive bidding process.

5. Bechtel II has no impact upon decisions of the Commission which dismiss applications for failure to comply with its Rules. In Rio Grande, supra, the Review Board correctly dismissed Passalacqua's application for its failure to specify a viable transmitter site and

concluded that his delinquent attempts to cure this deficiency did not meet the requirements of Rule 73.3522(b)(1).[1/] Bechtel II also leaves untouched the Commission's long-standing treatment of diversification of control of the mass media of communications as a comparative consideration of the highest priority which prevails over any other equal or lesser comparative preference. The Commission has consistently held that diversification is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities. See, Policy Statement On Comparative Broadcast Hearings, 1 FCC 2d 393 (1965); Snake River Valley Television, Inc., 20 RR 2d 644 (Rev. Bd., 1970); Terre Haute Broadcasting Corp., 25 FCC 2d 348 (Rev. Bd. 1970); Gilbert Broadcasting Corporation, 91 FCC 2d 450, 470, 52 RR 2d 429 (1982). This factor was considered in both the Initial Decision and the Review Board's decision in Rio Grande, supra, where, McComas was assessed a comparative demerit of decisional significance on this basis.[2/]

6. The Hearing Designation Order in Rio Grande, supra, specified that the areas and populations proposed to be served by each of the applicants should be considered under the standard comparative issue.[3/] Accordingly, the parties introduced joint engineering evidence

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1/ McComas was found disqualified and her application was dismissed by the ALJ in a Memorandum Opinion and Order released August 6, 1991 (FCC 91 M-2432) on the grounds that the application as originally filed contained no original signatures. The application was reinstated by the Review Board's Memorandum Opinion and Order released September 26, 1991 (FCC 91R-85). This matter is pending final resolution by the Commission.

2/ Aside from this controlling factor, the Board also found ". . .McComas clearly comparatively behind United on virtually every distinguishable factor. . .." See 8 FCC Rcd 6256 as n.3.

3/ 5 FCC Rcd 5442, 5443

which shows that United would serve 49,574 more persons than would be served by RGB, 98,007 more persons than McComas would serve and 454,465 more persons than would be served by Passalacqua. The Review Board recognized United's "good coverage" among other things, in preferring United as the "superior applicant." These comparative coverage figures loom large when considering the relatively limited populations in the various Municipios in Puerto Rico and the total population of the entire island. For example, the population of Rio Grande, the city of license in United's case, is 45,648 and the entire population of Puerto Rico is approximately 3.5 million according to the 1990 United States Census. Thus, the difference between United's proposed coverage and its nearest competitor RGB, 49,574 persons, is greater than the population of Rio Grande itself. Moreover, United would serve 98,007 more persons than McComas and 454,465 more persons than Passalacqua, and these figures represent almost 3% and 13%, respectively, of the population of the entire Island of Puerto Rico. These are comparative coverage differences of decisional significance.

7. The Court in Bechtel II in rejecting integration as a comparative consideration indicated that greater technical coverage is a more enduring public interest factor. It noted with approval appellant's argument there that ". . . the ephemeral period of initial ownership of a broadcast station [inherent in consideration of the integration factor] . . . is vastly outweighed as a public interest factor by the lasting impact of a technical facility which provides greater coverage . . .." The factor of diversification of ownership of the mass media of communications remains a factor of decisional significance in post Bechtel II considerations. The preservation of competing voices to influence public opinion takes on a greater role in a time when control

of radio broadcast outlets is being concentrated in fewer hands on a national basis. Moreover, concentration of control of the mass media poses an even greater threat to the free exchange of ideas in smaller areas such as Rio Grande. Therefore, both the Administrative Law Judge and the Review Board properly found that factor to be decisive in eliminating McComas in Rio Grande. Nothing contained in Bechtel II should change that determination.

8. In addition to the above, the comparative factor of broadcast experience, considered by the Board in Rio Grande survives the elimination of the integration criterion by Bechtel II. In Rio Grande, the Board found significant, the following: "On the past broadcast experience factor, McComas has no experience whereas fifty percent of the United principals have lengthy past broadcast experience . . .." 8 FCC Rcd 1256, n.3. The Bechtel II Court considered broadcast experience as the most essential predictive factor in determining who among competing applicants would provide the best service to the public. Thus, the Court in criticizing the Commission's emphasis on "integration" while denigrating the factor of "broadcast experience," stated:

> Although the Commission has argued that broadcast experience should be of minor significance because it can come with time it is hard to imagine that anyone seriously interested in picking winners would so heavily downgrade the contestants track records . . ..

With the elimination of integration, broadcast experience merits consideration of the highest order in determining which applicant would most likely provide the best service to the public. It is the applicant with the most experience in the day-to-day operation of a broadcast station who is most likely to provide the best service, especially when compared with the applicant with little or no experience in the field.

9. In the past the Commission downplayed broadcast experience on the grounds that emphasis on that factor might discourage newcomers, especially minorities, from applying. That fear is allayed in the Rio Grande proceeding where all four applicants have 100% minority credit. Moreover, with the advent of competitive bidding procedures and proposed preferential treatment for minority bidders, encouragement of new and minority participants in the broadcast industry will be preserved in the future.

10. Thus, it appears that the Commission could continue to consider broadcast experience under the holding of Bechtel II. Broadcast experience should receive the highest preference since it provides the best assurance of reliable broadcast service in the future.

11. In sum, it is submitted, that the twenty cases pending before the Commission which progressed at least as far as Initial Decision before the Court's pronouncement in Bechtel II, should be decided, if at all possible, on the record established before the Commission. While the integration factor was eliminated by Bechtel II, there are more than ample other factors of decisional significance which remain untouched by the Court's decision, and which permit these cases to be definitively resolved, at long last, in the public interest.

12. Chief among these factors are basic qualifying issues. Where such qualifying issues have been tried at the evidentiary phase of these cases, they should be resolved on the basis of the record developed. When that resolution is adverse to the applicant, the application should be dismissed. It makes much more sense to resolve these qualifying issues now even if

a competitive bidding process is implemented later. To defer resolution of basic qualification issues until after the bidding is completed, would result in further unnecessary delay and expense if the successful bidder is an applicant whose basic qualifications have already been found wanting as a result of the hearing process.

13. Aside from questions of disqualification other decisionally significant factors remain in the wake of Bechtel II. Primary among these is the factor of comparative coverage. This is an objective standard of enduring quality. Thus, in cases where there are differences in the areas and populations to be served by competing applicants, a preference should be awarded to the applicant that would provide the best technical service.

14. Also of significance is the factor of diversification of ownership of the mass media of communications which the Commission has always held to be a comparative consideration of the highest priority. See Policy Statement, Snake River, and Terre Haute and Gilbert Broadcasting, all supra. This important factor also survived Bechtel II and should be considered where applicable in deciding the pending cases. Finally, the Commission can and should consider as an independent factor, broadcast experience where this factor can be of assistance in deciding these pending cases. To the extent the Commission may be concerned with the endurance of these two factors, it could return to an appropriate holding period, requiring successful applicants who prevail on these bases to hold the license awarded for a period of three or more years.

15. As indicated above, the Rio Grande case to which United is a party has been in process now for almost ten years. The parties there have completed a hotly contested evidentiary hearing and have prosecuted their applications in good faith through two judicial decisions over a period of almost ten years duration. The amount of time and effort expended in this process by all concerned, including the government, has been enormous. It is estimated that the cumulative costs involved in Rio Grande to date, private and public, exceed one million dollars. Therefore, to abort the hearing process at this late date and require United and the other parties to begin anew in a competitive bidding process would be extremely wasteful, and essentially unfair to all concerned. Simple justice demands that these cases proceed to decision on the basis of the factors outlined above. As indicated, resolution of these cases based upon the above considerations would be in complete accord with the Court's holding in Bechtel II.

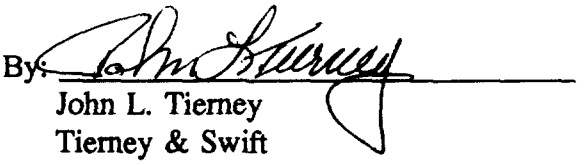
16. The fairest and most efficacious manner in which to proceed in these twenty post decisional cases is to give each applicant involved an opportunity to submit a brief in support of its case with the integration factor eliminated. The Commission should specify a relatively tight schedule for such submissions and limit the briefs to a maximum of twenty-five pages each to further expedite conclusion of these cases. These cases could then be concluded on the basis of the formal records already developed.

17. If for any reason the Commission finds after consideration of the briefs that any of these cases cannot be properly decided on the basis of the record developed, only then should they be designated for competitive bidding. The bidders should be limited to the applicants

previously designated for hearing who are also found to be basically qualified. Applicants with issues of disqualification pending against them should have these issues resolved before the bidding process begins and if found disqualified, those applications should be dismissed. At minimum, those pending qualified applicants whose cases are not resolved by the hearing process should have returned to them the hearing fees which they paid. Moreover, any funds generated by the bidding process should be used to reimburse the losing bidders for the legitimate and prudent expenses previously incurred by them in prosecuting their applications through the aborted hearing process. In the event the revenues generated are not sufficient to reimburse the losing bidders for all of their legitimate and prudent expenses, reimbursement should be made to them to the extent possible on a pro rata basis.

Respectfully submitted,

UNITED BROADCASTERS COMPANY

By: 

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January 26, 1998

CERTIFICATE OF SERVICE

I, Denise A. Branson, secretary in the law firm of Tierney & Swift, do hereby certify that on this 26th day of January, 1998, I sent by first-class mail, postage prepaid, copies of the foregoing "Comments of United Broadcasting Company" to the following:

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